IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	NO. 62624-8-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
ALAN T. GROMUS,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: March 8, 2010
	)	

Lau, J. — Alan Gromus challenges his convictions for two counts of first degree assault with deadly weapon enhancements, contending that (1) the trial court erred in admitting evidence of his wife's prior inconsistent statements, (2) the State improperly used these statements as substantive evidence of guilt, (3) the trial court's limiting instruction 26 impermissibly comments on the evidence, (4) improper opinion testimony violated his right to an impartial jury, (5) the trial court erred by denying his mistrial motion, and (6) the sentence imposed for the first degree assault with a deadly weapon and a deadly weapon enhancement violates double jeopardy. Because the trial court properly admitted the statements as impeachment evidence and instructed the jury on

its limited use, the State used the statements only as impeachment evidence, instruction 26 correctly stated the law without improper comment, defense counsel opened the door to opinion evidence, and the trial court property denied the mistrial motion, we affirm Gromus's convictions.

FACTS

On September 30, 2007, Pam Gromus and Greg O'Connor were assaulted with a baseball bat. The State charged Alan Gromus, Pam's husband of 32 years, with the crime. At the time of the assault, Gromus and Pam lived with their daughter Traci in a former nursing home they had converted into a residence with several attached rental units.[1] O'Connor was one of their tenants.

At trial, O'Connor testified that on the night of the assaults, he heard a commotion outside followed by a scream. He ran outside and saw Gromus sitting on top of someone. According to O'Connor, Gromus was holding a baseball bat at the person's throat and the person was thrashing around. Gromus stood up and O'Connor recognized the person on the ground as Pam. O'Connor testified that Gromus came towards him with the bat and struck his upper arm. O'Connor ran back inside and tried to lock the door, but before he could do so, Gromus crashed through the door, knocking him down. O'Connor said he grabbed the bat and yelled, "Alan, Alan. It's Greg," but that Gromus did not respond. 6 Verbatim Report of Proceedings (VRP) (July 1, 2008) at 37. Instead, according to O'Connor, Gromus pushed him down and tried to

[1] We refer to Pam and Traci Gromus by their first names for clarity.

grab the bat from him. O'Connor testified that he heard Pam screaming to Traci to call the police. Soon after, Gromus stopped struggling with O'Connor and went towards the front door of the Gromus house. O'Connor, whose ankle was injured, crawled to his room and called 911.

Gromus testified and gave a different version of what happened that evening. According to him, Pam and he went outside because she wanted to show him a piece of plastic that had broken off her truck's bug guard. As she was walking toward the truck, he stopped to move something. When he looked up, he saw Pam lying on the ground, and someone wearing a grey sweatshirt was swinging a bat towards him. Gromus claimed he wrestled with the attacker, grabbed the bat from him, and then the man ran away. Gromus said he returned to where Pam was lying, shook her, and shouted her name to see if she was responsive. At that point, according to Gromus, he saw someone stepping towards him and he thought it was the same person he had just chased off. He swung the bat at the man and pursued him as he ran towards the residences. He said he wrestled with the man over the bat until he realized it was O'Connor. At that point, he broke away and went to his house, where he waited until the police arrived a few minutes later.

Deputy David Stubben was the first officer to respond to Traci's 911 call.[2] He found Pam and Traci barricaded inside a bedroom. He asked Pam who injured her, and she replied that she did not see who hit her.[3] But when he spoke to Traci, she told

[2] In the 911 tape played to the jury, Pam told the 911 operator that Gromus hit her with a bat.

him that Pam said that Gromus hit her. Traci also told Deputy Stubben that her father had been drinking that evening.[4] Deputy Kyle Wiggins, who spoke with Pam at the hospital later that evening, testified that she told him she believed Gromus struck her. Sergeant Keith Brown spoke with Pam at the hospital, and she told him that she remembered Gromus choking her with a bat. Traci testified that at this point, Pam said she was 100 percent sure Gromus hit her. Dr. Austin Hayes testified that he treated Pam the following day, and she told him that Gromus had been drinking and hit her with a baseball bat.[5]

But Pam's trial testimony primarily supported her husband's version of events. She explained that she initially believed Gromus had attacked her because she thought they were the only two people outside. But after a few weeks, when she began weaning herself off pain medications, she remembered seeing a man in a grey sweatshirt moments after she was assaulted. She thought she had seen this man before at the apartment of one of their tenants, Dan McLaren. She noted that they had evicted McLaren on the day of the assault after other tenants complained that he and his friends were using drugs in the apartment.[6] On one occasion, she said she called

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[3] The statements made to Deputy Stubben and the other police officers that night were admitted without objection based on ER 803(a)(2), the excited utterance hearsay exception.

[4] The lead detective for the case, Terry Esskew, testified that he searched the Gromus residence the day after the assault, and he saw vomit on a green chair and in a bucket containing bottles of Mike's Hard Lemonade.

[5] This statement was admitted without objection, presumably based on the medical treatment exception to the hearsay rule. ER 803(a)(4).

[6] McLaren's apartment was located in Mount Vernon, not Anacortes, where the

the police about McLaren, and one of his friends lunged at her threateningly. Pam testified that she believed this man was the one who attacked her. She also testified that she and Gromus had a great relationship and it made no sense to her that he would suddenly attack her. She insisted that he had "absolutely not" put a bat against her throat. 3 VRP (June 26, 2008) at 92.

At trial, the State sought to impeach Pam's credibility with evidence of her prior inconsistent statements. The prosecutor asked her if she remembered calling the principal of Mount Vernon High School where she worked and telling him that Gromus hit her with a baseball bat, he must have planned to do it, she was going to take him for everything he had for doing this to her, the principal had her permission to tell others, and she wanted to lock up assets so Gromus did not have access to cash. Pam said she did not remember making these statements, but the principal testified that she did. Pam explained that the pain medications she was taking shortly after the assault had affected her memory of the events. The prosecutor asked Pam if she remembered speaking with other co-workers after the assault and telling them that she was frightened that Gromus would bail out of jail, he had been drinking lately, he had hidden a bat in the bushes and tried to kill her with it but that a neighbor intervened, and both she and the neighbor saw him do it. She testified that she did not recall making these statements, but her co-workers testified she did. They also testified that she seemed lucid, coherent, and clearheaded at the time she talked to them about the assault.

Before trial, the trial court denied Gromus's in limine motion to exclude these

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assault occurred.

statements as hearsay. The court reasoned,

> THE COURT: Well, I looked at that Newbern case, [State v.]Newbern, 95 Wn. App. 277[, 975 P.2d 1041 (1999)]. It's been cited a million times for several propositions.
>
> I believe that your initial statement in your brief probably sums it up: In general, [a] witness's prior statement is admissible for impeachment purposes if it's inconsistent with the witness's trial testimony.
>
> We've all done it. I have done it a million times myself impeached my own witness with prior inconsistent statement. And in this case, you are calling Mrs. Gromus for a myriad of reasons, one of which may be to get into some of these inconsistent statements, but she certainly is a named victim in one of the assault charges.
>
> [Prosecutor]: She was a witness from the first day.
>
> THE COURT: She was probably— if you only had to call two witnesses, it would have to be her and Mr. O'Connor. She certainly is a—may be the primary witness.
>
> The jury is going to hear from her and needs to hear from her. The fact that she made inconsistent statements before and she may now claim that she can't recall making the statements, I don't think is enough to keep the fact that she made the inconsistent statements out. Newbern says that.
>
> Newbern was interesting. It was pretty much similar to our factual situation. It was a situation where victim's statements from the hospital were made to some people, and then she later testified that she had no memory of making the statements. It's somewhat similar, not exact.
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> So I believe that Ms. Gromus is a primary witness. She's not being called merely for the purpose of impeachment. The fact that she made some consistent statements—some statements back then and may now testify to something different than that or testify that she can't remember now I think is admissible. The jury can hear that. It goes more to the weight of the situation, rather than to the admissibility itself.
>
> You can both argue your points of view as to what it means or doesn't mean, but I think it is admissible. I think it's something the jury ought to hear.
>
> I deny that motion in limine and allow—obviously, Ms. Gromus can testify. I allow her to be questioned as to any inconsistent statement, depending on how the testimony goes.

1 VRP (June 24, 2008) at 15–17.

In response to this ruling, defense counsel requested the court to give a limiting instruction.

> [Defense Counsel]: All right, but does that also mean that you are ruling

> that the people to whom she made these alleged statements can be called to testify that she told this to them, even if she says I don't remember making the statement?
>
> THE COURT: I suppose it can, yeah.
>
> [Defense Counsel]: Then I'll have to request a limiting instruction.
>
> THE COURT: Yes. Because it goes to impeachment and not to the truth of the matter.
>
> [Defense Counsel]: I mean to be addressed to the jury at the time that they testify.
>
> THE COURT: Absolutely, no doubt about that.
>
> [Defense Counsel]: All right.
>
> [Prosecutor] And I have no --
>
> THE COURT: —the instruction—in the book—
>
> [Defense Counsel]: And if you just wanted to read that to the jury, that would be—
>
> THE COURT: And I'll read it before every witness testifies, if you want.
>
> [Defense Counsel]: I'd like that.[7]

1 VRP (June 24, 2008) at 17–18. But during trial, after several of Pam's co-workers testified, he moved for a mistrial, arguing that the number of impeachment witnesses and the detailed scope of their testimony would cause the jury to treat the testimony as substantive evidence. The court denied the motion, noting that it had orally instructed the jury to limit their use of the evidence to evaluating the credibility of Pam's trial testimony.[8] The court stated, "I was watching them as I read it to them. I think the jury

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[7] Gromus asserts the trial court failed to instruct the jury before each impeachment witness testified. The preferred practice is to give the instruction at the time the evidence is admitted, so that the jury is better able to understand the limited purpose for which the evidence is admitted. Moore v. Mayfair Tavern, Inc., 75 Wn.2d 401, 451 P.2d 669 (1969). But the trial court may, in its discretion, defer a limiting instruction until the close of all the evidence. State v. Ramirez, 62 Wn. App. 301, 814 P.2d 227 (1991). Given this broad discretion, we conclude the trial court properly exercised its discretion by orally instructing the jury three times during the trial and finally in its limiting instruction 26.

[8] The record shows that the parties and the court agreed to give the oral limiting instruction proposed by defense counsel after making minor edits. The court gave the limiting instruction three times during the trial. Initially, the court stated, "Evidence of

got the point." 4 VRP (June 27, 2008) at 106. At the close of trial, the court gave instruction 26 to reiterate that evidence of Pam's prior out-of-court statements could not be used as substantive evidence.

> Evidence was introduced in this case on the subject of prior statements made by Pam Gromus to a number of individuals.
>
> The jury is instructed that it may consider her prior statements or answers to:
>
> 1. Dave Anderson
> 2. Kathy Dean
> 3. Jo McDonald
> 4. Janice Lint
> 6. Anita Roberson
> 7. Terry Esskew
> 8. Jennifer Sheahan-Lee
> 9. Roxanne Gardner

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prior statements of Pam Gromus is being elicited at this time. [The prosecutor's] questions right before lunch and commencing again now regard alleged prior statements made by Pam Gromus to a number of other people. You the jury are instructed that you may consider her prior statements or answers only for the limited purpose of assessing the credibility of Pam Gromus.

"The evidence or answers by Pam Gromus may not be considered by you as substantive evidence, that what she said in her prior statements actually took place. You must not consider her statements or answers for any other purpose, other than to assess the credibility of Pam Gromus." 3 VRP (June 26, 2008) at 180–81.

The next day the court repeated the instruction: "To refresh your memory, ladies [and] gentlemen of the jury, I want to read you an instruction at this time. It's the same one I read to you yesterday.

"Evidence of prior statements of Pam Gromus [is] being elicited at this time. [The prosecutor's] questions now, with these witnesses that he's calling, regard alleged prior statements made to Pam Gromus to a number of persons. You are instructed that you may consider Pam Gromus' prior statement or answers only for the limited purpose of assessing the credibility of Pam Gromus. The evidence or answers may not be considered by you as substantive evidence, that what they said in the prior statements actually took place. You must not consider statements or answers for any other purpose, other than to [assess] the credibility of Pam Gromus." 4 VRP (June 27, 2008) at 30.

And later the same day the court stated, "Anyway, [the prosecutor] is going to call another witness who is going to testify as to prior statements regarding Pam Gromus. I just want to remind you again, for the third time, that you may consider these prior statements of Ms. Gromus only the for the purpose of assessing her credibility. You cannot consider these prior statements of Mrs. Gromus as to proof of the matters asserted or what actually happened. You can only consider the prior statements as to her credibility." 4 VRP (June 27, 2008) at 109.

5. Krista Paulson 10. Lauren Wright

Only for the limited purpose of assessing the credibility of Pam Gromus.

Those answers may not be considered by you as substantive evidence that what she said in those prior statements actually took place.

You must not consider those statements or answers for any purpose other than to assess the credibility of Pam Gromus.[9]

In closing argument, the prosecutor showed slides comparing Pam's trial testimony that she did not recall making various statements with the testimony of the impeaching witnesses that she did make the statements and that she appeared coherent and lucid while doing so. At the same time, the prosecutor argued,

> Now, I want to talk a little bit about credibility here because—we're going to talk about credibility because one of the people we're going to be talking about is Pamela Gromus.
>
> . . . .
>
> And what you heard from the witness stand was Pam Gromus saying, I don't recall. I don't recall saying any of these things. Do you recall? I had to go through it item by item, and line by line by line having her say, I don't recall saying anything like that.
>
> And these are . . . what I took down as my notes of what, exactly what Pam Gromus told those people, according to their testimony, that she said she didn't recall saying. And what it goes to is credibility. It goes to her credibility. She doesn't recall—I think maybe on a few of them, I think she said she doesn't remember. . . . And you have to decide—when you look at it, look at credibility, what does that mean?
>
> The judge gave you an instruction on credibility . . . .
>
> . . . . that goes to credibility, and that's what we talk about in credibility. . . .
>
> . . . .
>
> . . . . What you have to do is, again, take these, take the other ones that I have, and put them in a big picture scenario to judge the credibility.
>
> So we've got, what, six people [who] came in from the high school. You all listened. What did they say? They all said kind of the same things in general.
>
> . . . .

[9] The court confined the limiting instruction to specific witnesses because other evidence of Pam's prior statements was admissible as substantive evidence, e.g., her accusatory statements to the 911 operator, Deputy Stubben, Deputy Wiggins, Sergeant Brown, and Dr. Austin Hayes.

. . . . [Y]ou have to judge the credibility in that context.

VRP (July 9, 2008) at 7–10.

The jury convicted Gromus of both counts of first degree assault with two deadly weapon enhancements. Gromus moved for a new trial, arguing that the prosecutor improperly argued that the prior inconsistent statements were substantive evidence of guilt. The court denied the motion and sentenced Gromus within the standard range. He appeals.

ANALYSIS

Prior Inconsistent Statements

Gromus claims admission of the prior inconsistent statement evidence violated his right to a fair trial. He argues that the large number of witnesses who testified and the detailed nature of their testimony caused the jury to treat the prior statements as substantive evidence. He contends the trial court should have granted his mistrial motion on this basis.[1] We review the denial of a mistrial motion under the abuse of discretion standard. State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989). A trial court should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial could ensure a fair trial. Hopson, 113 Wn.2d at 284. Here, Gromus's mistrial motion was based on his contention that the trial court improperly

[1] While we address this argument, we also note that Gromus arguably waived the issue by failing to make a specific objection to the co-workers' testimony until after several of them had already testified. See State v. Gray, 134 Wn. App. 547, 557, 138 P.3d 1123 (2006) (to make a timely objection, "party must make the objection at the earliest possible opportunity after the basis for the objection becomes apparent").

admitted Pam's prior out-of-court statements because they were hearsay.

"Hearsay" is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). Hearsay is inadmissible unless a specific exception applies. ER 802. But prior inconsistent statements are not hearsay if they are offered to challenge the declarant's credibility rather than for the truth of the matter asserted. State v. Williams, 79 Wn. App. 21, 26, 902 P.2d 1258 (1995). Thus, an adverse party may use a witness's prior inconsistent statements to show the witness's trial testimony is not believable because the witness tells different stories at different times. State v. Newbern, 95 Wn. App. 277, 293, 975 P.2d 1041 (1999). However, the prior inconsistent statements may not be used as evidence that the facts contained in the statements are substantively true. State v. Burke, 163 Wn.2d 204, 219, 181 P.3d 1 (2008).

The procedure generally used to impeach a witness with a prior inconsistent statement is to first ask the witness whether she made the prior statement.[11] State v.

[11] ER 613 is a partial codification of the procedural requirements for impeachment by prior inconsistent statement. It provides,

"(a) Examining Witness Concerning Prior Statement. In the examination of a witness concerning a prior statement made by the witness, whether written or not, the court may require that the statement be shown or its contents disclosed to the witness at that time, and on request the same shall be shown or disclosed to opposing counsel.

"(b) Extrinsic Evidence of Prior Inconsistent Statement of Witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2)."

And ER 607 permits a witness to be impeached by any party, including the party

Babich, 68 Wn. App. 438, 443, 842 P.2d 1053 (1993). If she admits the prior statement, extrinsic evidence of the statement is not allowed because such evidence "'would waste time and would be of little additional value.'" Babich, 68 Wn. App. at 443 (quoting 5A Karl B. Tegland, Washington Practice: Evidence § 258(2), at 315 (3d ed. 1989)). But if she denies the prior statement, extrinsic evidence of the statement is admissible unless it concerns a collateral matter. Babich, 68 Wn. App. at 443. Issues are collateral if they could not be shown in evidence for any purpose independent of the contradiction. State v. Alexander, 52 Wn. App. 897, 902, 765 P.2d 321 (1988). And it may be error for the prosecutor not to introduce extrinsic evidence.

> [I]f foundation questions are asked and the witness denies making the inconsistent statement, there may be error under particular circumstances if the cross-examiner does not later introduce extrinsic evidence of the statement. If the rule were otherwise, cross examination could be abused by making insinuations about statements that the witness did not in fact make, and the jury could be misled into thinking that the statements allegedly attributable to the witness were evidence.

Babich, 68 Wn. App. at 443–44 (quoting 5A Karl B. Tegland, Washington Practice: Evidence § 258(2), at 316 (3d ed. 1989)). The contradiction or inconsistency need not be direct. For example, "even if a witness cannot remember making a prior inconsistent statement, if the witness testifies at trial to an inconsistent story, the need for the jury to know that this witness may be unreliable remains compelling." Newbern, 95 Wn. App. at 293. The test is not whether individual words or phrases differ, but whether the "'whole impression or effect'" of what has been said or done appear inconsistent. State

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calling the witness. "The credibility of a witness may be attacked by any party, including the party calling the witness."

v. Dickenson, 48 Wn. App. 457, 467, 740 P.2d 312 (1987) (quoting 5 Karl B. Tegland, Washington Practice: Evidence § 256 (2d ed. (1992)).

Here, the trial court's admission of Pam's prior inconsistent statements was not improper because the statements were offered to impeach her credibility, not as substantive evidence. Pam's story at trial was that she and Gromus had a great relationship and that she did not believe he assaulted her. Instead, she claimed that after she began weaning herself off pain medications, she remembered seeing a man in a grey sweatshirt at the scene and this was the man responsible for the attack. But Pam's alleged statements to the principal and her co-workers that Gromus hit her and strangled her with a baseball bat, she saw him do it, she was going to take him for everything he had, she wanted to lock up his assets, and she was frightened of him create a "whole impression or effect" inconsistent with her trial testimony about the assault and their relationship. The jury could reasonably conclude from her prior statements that her trial testimony was not credible. And these statements pertain to core issues in the case—the credibility of the victim—so they are not inconsistencies about tangential, collateral matters.[12]

[12] Our review of the record shows that Gromus's challenge to the detailed scope of the impeaching witnesses' testimony also lacks merit because his pretrial in limine motion sought to exclude all impeachment evidence. Defense counsel argued, "The prosecutor cannot call the impeaching witness because [Pam's] answer is: I don't remember." 1 VRP (June 24, 2008) at 13.

"[U]nless there is an exception to the hearsay rule, anything Pam said to anybody is hearsay.

"The second thing which I think we can all agree on is that if a witness says they don't remember something, and they don't remember saying it to somebody else, then that is something that is not subject to impeachment by calling the other person to testify about something that this person doesn't remember." 1 VRP (June 24, 2008)

Consequently, these statements were properly admitted and the trial court did not abuse its discretion by denying Gromus's mistrial motion.[13] The record here does not support Gromus's suggestion that the number of impeachment witnesses and the extent of their testimony converted the impeachment evidence into substantive evidence.

Gromus also argues that the prosecutor engaged in misconduct by using the prior statement evidence in a way that invited the jury to treat the statements as substantive evidence. In particular, he cites the prosecutor's closing argument in which he used slides to juxtapose Pam's alleged prior statements with her trial testimony.[14] A defendant claiming prosecutorial misconduct must show both that the prosecutor's

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at 11. But he did not request the court to limit the number of impeachment witnesses or the scope of their testimony. In addition, the record shows that the impeachment witnesses also testified about Pam's physical appearance, demeanor, and mental state in direct response to Gromus's expert neuropsychologist who examined Pam and testified that her head injury caused memory problems and made the reliability of her statements to others unreliable and suspect. On this point, in response to defense counsel's in limine motion to exclude all impeachment witnesses, the prosecutor argued, "And another thing to consider is [defense counsel's] going to bring in a witness, Dr. Fitz, who examined Ms. Gromus, to talk about memory and how memory changes over time and how things can be suggestive at the start." 1 VRP (June 24, 2008) at 15.

[13] Gromus also objects to the admission of the co-workers' testimony that Pam appeared lucid, coherent, and clear headed when making her prior statements. But this testimony was based on their personal observations about Pam's demeanor, so it was not hearsay. This evidence was admissible to contradict Pam's explanation that she did not initially remember the man in the grey sweatshirt because she was on pain medication. See 5A Tegland, supra, at 407 ("a witness may be impeached by introducing evidence to contradict the witness on a material fact").

[14] But the record discloses that defense counsel made no objections to the prosecutor's closing argument or the prosecutor's use of the slides during closing argument.

conduct was improper and that it resulted in prejudice. State v. Munguia, 107 Wn. App. 328, 336, 26 P.3d 1017 (2001).

Here, Gromus fails to show the prosecutor's conduct was improper. While the record shows that the prosecutor extensively contrasted Pam's alleged pretrial statements with her trial testimony, he did not argue the prior statements constituted evidence that Gromus assaulted her. Instead, he properly argued that the prior statements undermined the credibility of Pam's trial testimony. For example, when discussing her prior statements, he emphasized, "[W]hat it goes to is credibility. It goes to her credibility . . . . What you have to do is, again, take these, take the other ones that I have, and put them in the big picture scenario to judge the credibility." VRP (July 9, 2008) at 8–10. We also note that juries are presumed to follow the court's instructions. State v. Hanna, 123 Wn.2d 704, 711, 871 P.2d 135 (1994). And here, the trial court orally instructed the jury three times during the trial and in the court's written instructions that they could not use evidence of Pam's prior inconsistent statements as substantive evidence. Gromus fails to overcome the presumption that the jury followed this instruction.

Finally, even assuming the jury improperly considered the prior statements as substantive evidence, Gromus fails to establish prejudice. The jury had before it the 911 call in which Pam told the operator that Gromus hit her with a bat, Deputy Wiggins's testimony that Pam told him she believed Gromus struck her, Sergeant Brown's testimony that Pam told him that she remembered Gromus choking her with a bat, Traci's testimony that Pam initially said she was 100 percent sure Gromus hit her, Dr. Hayes's testimony that Pam told him

Gromus had been drinking and hit her with a bat, Pam's testimony that she remembered telling the 911 operator and Traci that Gromus hit her with a baseball bat, and finally, Pam's testimony acknowledging that she received crime victim's compensation based on an application she signed in which she named Gromus as her attacker. Thus, even assuming error, there is no reasonable probability it affected the trial's outcome because virtually identical evidence was already properly before the jury as substantive evidence. Moreover, the jury also heard O'Connor's testimony that he witnessed Gromus choking Pam with a bat and that Gromus attacked him and did not stop even after he identified himself. And there was undisputed evidence that Gromus had been drinking that evening and that there was vomit in his chair. Under these circumstances, it is unlikely that the prior inconsistent statements, even if improperly considered by the jury as substantive evidence, affected the verdict.

Judicial Comment—Instruction 26

Gromus also contends that instruction 26 limiting the prior inconsistent statements was an improper comment on the evidence. He notes that it contained the phrases "statements made by Pam Gromus," "her prior statements," and "what she said." He argues that the "question of whether [Pam] actually made the alleged statements was at issue at trial" and the instruction "clearly conveyed that the judge believed that the statements were made and vouched for them as critical to Pam Gromus's credibility."[15] Appellant's Opening Br. at 31. But our review of the record shows that whether Pam actually made

prior statements to witnesses was not an issue during the trial.[16] For example, when the prosecutor questioned her about statements she made the day after the assault to four co-workers who visited her at her home and who testified at trial about her statements, she testified that she remembered the visit but claimed repeatedly no memory of what she had told them about the assault. And at trial, defense counsel acknowledged the issue was not whether Pam actually made prior statements to the witnesses. In a colloquy with the court about Pam's prior statements, he stated, "Remember, these are things she doesn't remember—I know you know that—as opposed to saying, no. I never said that." 4 VRP (June 27, 2008) at 107. Nothing in the record establishes Gromus's present claim that, "the question of whether [Pam] actually made the alleged statements was at issue at trial." Appellant's Opening Br. at 31. Thus, instruction 26 did not address a fact disputed at trial. Like the trial court's oral instructions during trial, its purpose was merely to limit how the jury could use the evidence of prior inconsistent statements. Moreover, the judge's instruction did not "vouch for" the prior statements or suggest that he personally believed the prior statement evidence was accurate. Under these circumstances, we conclude instruction 26 was not an improper comment on the evidence.

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[15] Gromus did not object to the instruction below. However, because a judicial comment in a jury instruction is an error of constitutional magnitude, it may be raised for the first time on appeal. State v. Jackman, 156 Wn.2d 736, 743, 132 P.3d 136 (2006).

[16] In addition, the limiting instruction proposed by Gromus and read to the jury three times during the trial used phrases similar to the contested phrases in instruction 26, "Evidence of prior statements of Pam Gromus is being elicited at this time," "these statements of Ms. Gromus" and "her prior statements or answers." See footnote 8. And Gromus does not challenge these oral instructions in this appeal.

Opinion Testimony

For the first time on appeal, Gromus asserts that Detective Esskew improperly testified to his opinion that Gromus was guilty, thereby denying him the right to an impartial jury. Under RAP 2.5(a), only "manifest" constitutional errors may be raised for the first time on appeal. A "manifest" error is one that is "unmistakable, evident or indisputable." State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992).

Generally, a witness may not offer opinion testimony regarding the guilt or veracity of a defendant. City of Seattle v. Heatley, 70 Wn. App. 573, 577, 854 P.2d 658 (1993). Such testimony is thought to be unfairly prejudicial to the defendant because it invades the exclusive province of the jury. State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). And opinion testimony on an ultimate issue at trial may constitute manifest constitutional error. See State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007) (emphasizing that such error does not necessarily arise in every case). However, the "open door" doctrine gives the trial court discretion to admit otherwise inadmissible evidence when the opposing party raises a material issue. State v. Berg, 147 Wn. App. 923, 939, 198 P.3d 529 (2008). "[O]nce a party has raised a material issue, the opposing party is permitted to explain, clarify, or contradict the evidence." Berg, 147 Wn. App. at 939. And under the "invited error" doctrine, a party is barred from "setting up an error at trial and then complaining of it on appeal." State v. Pam, 101 Wn.2d 507, 511, 680 P.2d 762 (1984), overruled on other grounds by State v. Olson, 126 Wn.2d 315, 893 P.2d 629 (1995).

Here, Gromus's defense was principally based on his claim that Detective Esskew immediately decided he was

guilty and did not adequately investigate whether there was another potential suspect. It was Gromus who first brought out Pam's contention that Detective Esskew used coercive tactics to convince Traci to change her mind about who assaulted Pam. And it was Gromus who first questioned Traci about a list of reasons Detective Esskew gave her for why he thought Gromus was the one who attacked Pam. In response, the State sought to explain the context around the confrontation between Traci and Detective Esskew. When the prosecutor offered the list into evidence, Gromus offered no objection to its admission.

> Q. This the list that they were talking about that had a bunch of reasons; is that correct?
> A. Correct.
> [Prosecutor]: Move the admission of 69.
> THE COURT: Any objection?
> [Defense counsel]: Well, your Honor, it contains a lot of personal feelings of Deputy Esskew, but I think those are all probably relevant by this point. So no objection.

6 VRP (July 1, 2008) at 178. Ultimately, Gromus chose to directly elicit Detective Esskew's opinion in order to further support his biased police investigation claim.

> Q. So you were trying to convert [Traci] to your point of view, correct?
> A. No conversion was necessary. I was showing her the facts that we had at that time or the reasons that we knew it was Alan versus a third person.
> Q. Oh you knew it was Alan?
> A. I still believe it was Alan.
> Q. You know it was Alan?
> A. There is no doubt in my mind, sir.
> Q. None at all?
> A. None whatsoever.

7 VRP (July 2, 2008) at 91–92. Gromus then used this testimony strategically in his closing argument to support his argument that Detective Esskew conducted an

inadequate investigation, suggesting that what he termed the "Esskew attitude" was nothing more than tunnel vision that could result in the prosecution of an innocent person.

Under these circumstances, the admission of Detective Esskew's opinion was not a manifest constitutional error. Gromus opened the door to the testimony around Detective Esskew's alleged coercive tactics with Traci. And he cannot complain that opinion testimony was erroneously admitted when he elicited the opinion.

Mistrial Motion

Gromus also moved for a mistrial after the prosecutor asked his expert witness about an incident of marital disharmony years earlier, allegedly in violation of a ruling in limine. Gromus contends the trial court erred in denying the mistrial motion. As noted above, we review the denial of a mistrial motion for abuse of discretion. State v. Lewis, 130 Wn.2d 700, 707, 927 P.2d 235 (1996). Because the declaration of a mistrial is a "drastic measure," it should be granted only "when the defendant has been so prejudiced that nothing short of a new trial can ensure that the defendant receives a fair trial." State v. Jungers, 125 Wn. App. 895, 901–02, 106 P.3d 827 (2005); State v. Falk, 17 Wn. App. 905, 908, 567 P.2d 235 (1977).

Here, the trial court did not abuse its discretion. Before trial, it reserved a decision on whether it would exclude allegations that Pam hid excessive credit card spending from Gromus years earlier, subject to a further offer of proof. During trial, Gromus called Dr. Ted Judd, a neuropsychologist, to offer an opinion that he sustained a concussion. His intent was to show that he was injured during the assault, thereby bolstering his version of events. During

direct examination, Dr. Judd testified about the history he took, which formed part of the basis for his opinion. He testified that Gromus's son informed him there was no history of domestic violence in the home. On cross-examination, the State asked Dr. Judd whether Gromus's son had reported his parents discussing divorce. Dr. Judd replied that the son had mentioned an incident in which Pam accumulated excessive credit card debt.

Gromus moved for a mistrial. But the court concluded there was no violation of the in limine order because the reference to the credit card dispute (along with Dr. Judd's testimony regarding the absence of a history of domestic violence) was not admitted for its truth, but only to show the basis for Dr. Judd's opinion under ER 705. The court offered to give a limiting instruction regarding the testimony, but Gromus declined.

Gromus argues that if he had more warning, he could have persuaded the trial court that the testimony regarding the credit card dispute was inadmissible. He contends that this aspect of Dr. Judd's medical history was only tangentially related to his conclusion that Gromus sustained a concussion. But even assuming Gromus's argument is correct, he fails to show why the limiting instruction he rejected would not have cured the irregularity. Consequently, his mistrial argument fails.

Cumulative Error

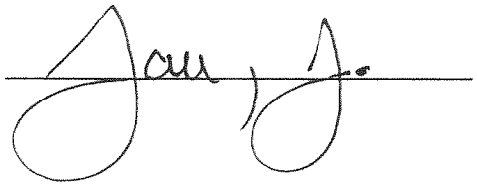
"The cumulative error doctrine applies only when several trial errors occurred which, standing alone, may not be sufficient to justify a reversal, but when combined together, may deny a defendant a fair trial." State v. Hodges, 118 Wn. App. 668, 673–74, 77 P.3d 375 (2003). Gromus

bears the burden of proving he was prejudiced by the accumulation of errors. State v. Price, 126 Wn. App. 617, 655, 109 P.3d 27 (2005). Here, Gromus's cumulative error argument fails because he has not demonstrated any error.

Double Jeopardy

Gromus contends that the use of deadly weapon enhancements, in combination with first degree assault (an element of which is use of a deadly weapon), violates double jeopardy. But this argument fails under our Supreme Court's recent decision in State v. Aguirre, No. 82226-3 (Wash. Mar. 4, 2010).

For the foregoing reasons, we affirm.



WE CONCUR: